

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. DAVIS	:	CIVIL ACTION
	:	
v.	:	
	:	
GENERAL ACCIDENT INSURANCE COMPANY	:	
OF AMERICA and WILLIAM JENKINS	:	NO. 98-4736

MEMORANDUM AND ORDER

HUTTON, J.

December 1, 2000

Presently before the Court are the Defendant's Motions in Limine (Docket No. 46), the Plaintiff's Memorandum of Law in Opposition to the Defendant's Motions (Docket No. 61), and the Defendant's Reply Memorandum of Law in Further Support of Their Motions (Docket No. 69).

I. BACKGROUND

The Plaintiff, William Davis, initiated this action on September 3, 1998 against the Defendants, General Accident Insurance Company of America (GAI) and William Jenkins (Jenkins). On March 3, 1999, the Plaintiff filed a first amended complaint which requests relief from both Defendants for racially-motivated employment discrimination under 42 U.S.C. § 1981, conspiracy to deprive the Plaintiff of his rights to make and enforce an employment contract under 42 U.S.C. § 1985(3), and neglect to prevent conspiracy under 42 U.S.C. § 1986. In addition, the

Plaintiff sought relief from a violation of Title VII of the Civil Rights Act of 1964 from the Defendant GAI only.

The substance of the allegations surround the Plaintiff's resignation from Defendant GAI in September of 1997. The Plaintiff began working for the Defendant GAI in December of 1983 as a team leader in the corporate project management department. After two years at GAI, the Plaintiff was promoted to a manager position which he held until January of 1993. In January of 1993, GAI took away the Plaintiff's management responsibilities and reduced his salary grade from a level 18 to a level 16 pursuant to a departmental reorganization.

The Plaintiff alleges that at the time of his "demotion" his manager put a memo in his personnel file recommending the Plaintiff be considered when a managerial position came up in the future. Since that time, the Plaintiff enumerates five positions, considered promotions, which he was not offered. In addition, the Plaintiff claims to have been demoralized by certain conduct in the office. According to the Plaintiff, the Defendants refused to promote the Plaintiff despite efforts by his supervisors to get him promoted. In addition, he claims to have been subjected to humiliating working conditions. The Plaintiff claims this is the result of the Defendants' racial animus.

These issues finally came to a head in September of 1997. Prior to that time, the Plaintiff's former supervisor, John H.

Cousins, III (Cousins), filed a retaliation lawsuit against GAI claiming that he had been terminated as a result of his vocal opposition to what he believed was discrimination against the Plaintiff. In February of 1997, the Plaintiff was asked to discuss what he knew about the Cousins lawsuit with GAI management. Plaintiff alleges that in retaliation for his responses to this questioning, he was taken off of a high profile project which he had hoped would put him in line for a promotion. After these actions, the Plaintiff resigned from GAI in September of 1997.

On July 20, 2000, the Defendants filed these motions in limine seeking to preclude the introduction of certain pieces of evidence. The Plaintiff responded and the Defendants filed a reply brief in further support of their motions. The Court has considered these filings and now addresses the Defendants' requests.

II. DISCUSSION

Under Federal Rule of Evidence 401, "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "The standard of relevance established by [Rule 401] is not high." Carter v. Hewitt, 617 F.2d 961, 966 (3d Cir. 1980). Once the threshold of logical relevancy is satisfied, the matter is largely within the discretion of the trial court. See United States v. Steele, 685 F.2d 793, 808 (3d Cir. 1982). Federal Rule

of Evidence 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Fed. R. Evid. 402.

Under Federal Rule of Evidence 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. "Rule 403 does not act to exclude any evidence that may be prejudicial, but only evidence the prejudice from which substantively outweighs its probative value." Charles E. Wagner, Federal Rules of Evidence Case Law Commentary 212 (1999-2000). The Court addresses each of the Defendants' evidentiary claims using these standards.

A. Evidence of Alleged Acts of Discrimination Occurring Before September 3, 1996 and Evidence Related to Defendant GAI's Investigation of John H. Cousins, III's Internal Complaint

The Defendants request that the Court preclude the presentation of any evidence regarding discriminatory conduct which would be time-barred if brought as its own claim. They also assert that the Court should bar evidence of an internal complaint filed by the Plaintiff's former supervisor. The arguments put forth for

the exclusion of both sets of evidence are substantially similar as to merit discussing them together.

The Defendants propose that the admission of time-barred claims may constitute reversible error. This proposition is gleaned from the Third Circuit's decision in Rush v. Scott Specialty Gases Inc., 113 F.3d 476 (3d Cir. 1997). The Defendants' argument must fail for several reasons: (1) their analysis of which claims are time barred is inaccurate; (2) their reading of the Rush case is too broad; and (3) the analysis in Stewart v. Rutgers, The State University, 120 F.3d 426 (3d Cir. 1997), is applicable to the instant case.

To determine which discriminatory acts are time-barred, the Defendants have used as their benchmark September 3, 1998, the date that the Plaintiff filed his complaint. The Defendants work their way backward using the relevant statute of limitations periods. This analysis ignores the impact of the continuing violation theory which allows the Plaintiff to recover for a pattern of discriminatory acts if the Plaintiff shows that one act of discrimination occurred within the filing period and "that the harassment is 'more than the occurrence of isolated or sporadic acts of intentional discrimination.'" See West v. Philadelphia Elec. Co., 45 F.3d 744, 754-55 (3d Cir. 1995). The Plaintiff has alleged timely claims of, as the Defendants put it, "discriminatory reduction in responsibilities and constructive discharge." While

the Defendants assert that these are entirely different from the Plaintiff's claims of "discriminatory demotion, failure to promote/reclassify and the purported 'racial' comments", the Court disagrees. As a result, the Plaintiff has adequately alleged discrimination within the statute of limitations period and a pattern of discriminatory behavior. Applying the continuing violations theory, the Plaintiff would be allowed to recover for acts that would otherwise be time-barred. See Id. at 755.

To exclude this evidence, the Defendants have relied too heavily on a broad reading of the Third Circuit's decision in Rush v. Scott Specialty Gases, Inc. 113 F.3d 476. In Rush, the Court reversed a verdict handed down on a sexual harassment and constructive discharge claim because the verdict had been "infected" by the presence of a time-barred claim for failure to promote and train. Id. at 485. The Defendants' themselves point out that the failure to promote and train claims in Rush were both outside of the statute of limitations period. That is starkly different from the instant case where the Plaintiff has alleged discriminatory acts within the limitations period. In addition, Rush was a case where a time-barred discrimination claim was tried with separate and distinct discrimination claims. Id. at 483. That is very different from a case where all of the claims are tied to continuing violations.

Even if the continuing violations theory was not warranted, the discriminatory acts would still be admissible to support timely allegations of adverse employment actions. The Plaintiff has alleged adverse employment decisions into 1997, within the statute of limitations period. To recover on these claims, the Plaintiff will be required to show that the actions were motivated by discrimination. See Stewart, 120 F.3d 432-33. The prior acts of discrimination are relevant to this determination. See Id. at 433.

The case before the Court is much more similar to Stewart v. Rutgers, The State University than to the Rush case. See Id. at 426. In Stewart, the Third Circuit reversed the district court's grant of summary judgement claiming it was error for the district court to exclude the grievance committee's finding that a previous tenure denial of the Plaintiff was "arbitrary and capricious." Id. at 433. The Third Circuit stated that "[w]hile the district court was correct in finding that any discrimination claim based on [the Plaintiff's] 1992-93 tenure denial is time-barred, we reject the notion that the events surrounding that denial are not relevant evidence which [the Plaintiff] could use at trial." Id. In reaching this conclusion, the Court relied upon precedent from the United States Supreme Court which has found that discriminatory acts which are time barred may still "constitute relevant background evidence in a proceeding in which the status of a current practice is at issue," this is true even though "separately

considered, it is merely an unfortunate event in history which has no present legal consequences." Id. (quoting United Air Lines v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889 (1977)). Stewart is a case where the Plaintiff wanted to use past acts of discrimination, not to create a separate and distinct claim as in Rush, but to show that recent misconduct of a similar nature was motivated by discrimination. As stated previously, the instant case involves timely allegations of adverse employment actions motivated by discrimination and the Plaintiff is entitled to use past acts of discrimination to show that the explanation for the employment actions offered by the Defendants is pretextual.

For the foregoing reasons, the Defendants' motion to exclude all evidence of time-barred claims and evidence of an internal complaint filed by John H. Cousins, III is denied.

B. Evidence Related to Plaintiff's Back Pay or Front Pay Losses

The purpose of a motion in limine is "to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions." Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1069 (3d Cir. 1990). This stands in contrast to a motion for summary judgement which has as its purpose "to eliminate a trial in cases where there are no genuine issues of fact." Id. If a party's motion in limine seeks to preclude all evidence that would support the other party's claims, their motion in limine is

essentially acting like a motion for summary judgement. Id. at 1069-70. That is precisely what the Defendants have attempted to do in the instant case.

By arguing that evidence of back and front pay should be excluded because the Plaintiff's have failed to make a claim for constructive discharge, the Defendants are asking the Court to weigh in on the merits of the Plaintiff's constructive discharge claim. This Court's scheduling orders have provided that "all dispositive motions [shall be] filed not later than two (2) weeks prior to the close of discovery." In this case, discovery was required to be completed by October 25, 1999. At this stage of the proceedings, it is untimely for a summary judgement motion and too early for a motion for judgement as a matter of law. See Thompson v. Glenmede Trust Co., No. 92-5233, 1996 U.S. Dist. LEXIS 13674, at *2 (E.D.Pa. Sept. 16, 1996).

Moving beyond the request for summary judgment on the Plaintiff's constructive discharge claim, the Defendant urges the Court to declare back and front pay inappropriate in this case. If a plaintiff is successful in a discrimination action against an employer, they may be entitled to an award of both front and back pay to make the victim whole and account for pre-judgment and post-judgment effects of discrimination. See Loeffler v. Frank, 486 U.S. 549, 558, 108 S.Ct. 1965 (1988); Sellers v. Delgado College, 902 F.2d 1189, 1196 (5th Cir. 1990). Repeatedly, the Defendants

rely on the fact that the Plaintiff's salary increased when he left the Defendants' employ to show that there could not possibly be any front or back pay damages. This assertion is rebutted by the Plaintiff's allegation that his salary would have been much higher, and the salary at his new job would not have been an increase, if the alleged discrimination had never occurred. It would be inappropriate to make a determination of the reasonableness of these claims and appropriateness of these remedies prior to the presentation of evidence.

For the foregoing reasons, the Defendants' motion to exclude evidence on back pay and front pay losses is denied.

C. Evidence of Plaintiff's Emotional Distress Damages

The Defendants urge the Court to exclude all evidence related to the Plaintiff's damages in the form of emotional distress. The Defendants' argument is essentially that the Plaintiff has no evidence of such an injury. In Blackshear v. City of Wilmington, 15 F. Supp. 2d 417 (D.Del. 1998), the court stated that "intangible injuries such as sleeplessness, headaches, and feelings of humiliation and embarrassment are sufficient to support an award for compensatory damages." Id. at 430. The court continued that while a discernable injury is necessary, "medical evidence and corroborating testimony is not always necessary to support an award of mental anguish damages." Id. The Third Circuit has held that expert testimony is not necessary to corroborate a claim for

emotional distress in the civil rights context because of "the broad remunerative purpose of the civil rights laws." Bolden v. SEPTA, 21 F.3d 29, 34 (3d Cir. 1994). While it is true that if the Plaintiff offers no evidence of actual injury a claim for emotional distress damages would be unwarranted, that is very different from a situation where the Plaintiff simply does not offer expert testimony. See Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1121 (3d Cir. 1988) (Plaintiff's claim for emotional damages rejected because he offered "no evidence" to support his claim). It is premature for the Court to conclude that the Plaintiff has no credible evidence to support his claim for emotional distress damages.

For the foregoing reasons, the Defendants' motion to exclude evidence of emotional damages is denied.

D. Evidence Relating to Alleged Discrimination Against Individuals Other Than the Plaintiff

The Defendants claim that the presentation of any evidence relating to other employees' claims of discriminatory conduct by the Defendants would be unduly prejudicial and should be precluded by this Court. This arises specifically in the context of three potential witnesses: John H. Cousins, III (Cousins), Ralph Herbst, and Derrick Coker. The Plaintiff states that they do not intend to offer any evidence of discrimination against Ralph Herbst and Derrick Coker; therefore, the Defendants' motion regarding those

two witnesses will be granted. The Court turns its attention to the evidence sought regarding Cousins.

The Defendants' argument for excluding the testimony of Cousins is essentially that because Cousins was discharged on July 31, 1996, he cannot provide any evidence that does not relate to time-barred claims. Because of the reasons set forth above in the Court's discussion of time-barred claims, the Defendants' argument must fail with respect to Cousins. As the Plaintiff's supervisor, Cousins had first-hand knowledge of the motivations behind employment decisions involving the Plaintiff. That information is highly relevant to an essential element of the Plaintiff's case, whether the Defendants' employment decisions regarding the Plaintiff were motivated by discrimination. See Stewart, 120 F.3d 432-33.

For the foregoing reasons, the Defendants' motion regarding the exclusion of evidence related to Ralph Herbst and Derrick Coker is granted and the Defendants' motion regarding the exclusion of evidence related to John H. Cousins, III is denied.

**E. Evidence Regarding the Racial Composition of the
Defendants' Workforce**

The Defendants next contention is that the Court should preclude the admission of statistical evidence regarding the racial composition of the Defendants' workforce because that information is irrelevant, unduly prejudicial, and misleading to the jury. The

main objection to the Plaintiff's proffered statistical evidence is that the numbers represent simply the percentage of minorities holding officer positions with the Defendant GAI and contain no analysis of those numbers such as the relevant qualifications of the candidates that had applied for those positions. Without an analysis of the applicant pool and qualifications for those positions, the Defendants contend, a statistical analysis of the racial composition of the management/officer level would not be probative of the motivations behind the employment decisions effecting the Plaintiff. The data that Plaintiff seeks to introduce in this case consists only of GAI's EEO-1 data, which shows great disparity between the number of Caucasians and African-Americans in the manager/officer ranks, and Defendant GAI's admission that one out of 70 officers in the company is "African American."

GAI's EEO-1's, which contain evidence of gross disparity at the officer/manager level positions, are highly probative and relevant to drawing an inference of racial discrimination, and whether GAI was aware of this disparity.

For the forgoing reasons, the Defendants' motion to exclude evidence relating to the racial composition of Defendant GAI's workforce is denied.

F. Evidence Relating to the Plaintiff's Unrelated Medical Conditions and Testimony Concerning Defendant Jenkins' Alleged Extramarital Affair

The Defendants next seek to exclude the admission of evidence of the Plaintiff's back condition and heart arrhythmia claiming they are unrelated to the present claim. In addition, they seek the exclusion of evidence pertaining to Defendant Jenkins' alleged extramarital affair. The Plaintiff has stated that he does not intend to introduce any evidence on these matters at trial. Therefore, the Defendants' motion to exclude evidence on the Plaintiff's back condition and heart arrhythmia, and evidence regarding Defendant Jenkins alleged extramarital affair is granted.

G. Examination of Defendant Jenkins on His Alleged Use of Racial Epithets

Finally, the Defendants ask the Court to preclude questioning of the Defendant Jenkins on his alleged use of racial epithets because it will inflame the jury, is highly prejudicial, and is impermissible character evidence. In attempting to prove a discrimination case, circumstantial evidence is essential and discriminatory comments by an executive in the decision making process can provide strong circumstantial evidence. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996); Abrams v. Lightolier Inc., 50 F.3d 1204, 1215 (3d Cir. 1995). While the introduction of this evidence can be prejudicial, it can also prove highly probative. See Abrams, 50 F.3d at 1215. The key

inquiry is whether the probative value of the evidence is substantially outweighed by its prejudicial effect. Fed. R. Evid. 403.

The defense contends that the Plaintiff will question the Defendant Jenkins on his alleged use of racial slurs thirty to forty years ago as a youth. The Court finds that this evidence has no probative value in answering the question at issue because the time frame is too remote and an answer would shed no light on the Defendant's current state of mind. As a result, the Plaintiff shall not question the Defendant Jenkins on his childhood use of racial epithets.

The analysis changes when focusing on the Defendant's alleged recent use of racial slurs. Discriminatory comments made in the workplace are relevant circumstantial evidence probative of a decision maker's motivations in making employment decisions. See Abrams, 50 F.3d at 1215. The Court find that the same is true for racial slurs made outside of the workplace. While the weight given to external comments will be less than that given to workplace comments, the language itself represents relevant circumstantial evidence of the decision maker's mindset. The Defendant claims that the jury will be prejudiced by the Defendant's admission that he has, at times, used a racial slur when becoming upset while driving. There is no reason to believe that the jury cannot appropriately separate an angry utterance in the heat of "road

rage" from an indication of a state of mind which may have influenced the Defendant's conduct toward the Plaintiff.

However, any such inquiry into racial epithets must have a relevant time frame. As the first alleged discriminatory acts against the Plaintiff took place in 1993, the Plaintiff will only be allowed to question Defendant Jenkins on his use of racial epithets in the period of time after 1990. The probative value of any older claims is outweighed by the prejudicial effect it will have on the jury.

For the foregoing reasons, the Defendants' motion to prevent the questioning of Defendant Jenkins regarding his alleged use of racial epithets is granted as to any alleged older uses of racial epithets and denied as to his alleged more recent use.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. DAVIS	:	CIVIL ACTION
	:	
v.	:	
	:	
GENERAL ACCIDENT INSURANCE COMPANY	:	
OF AMERICA and WILLIAM JENKINS	:	NO. 98-4736

O R D E R

AND NOW, this 1st day of December, 2000, upon consideration of the Defendant's Motions in Limine (Docket No. 46), the Plaintiff's Memorandum of Law in Opposition to the Defendant's Motions (Docket No. 61), and the Defendant's Reply Memorandum of Law in Further Support of Their Motions (Docket No. 69), IT IS HEREBY ORDERED that the Defendants' Motions are **GRANTED IN PART and DENIED IN PART.**

IT IS HEREBY FURTHER ORDERED that the Defendants' Motion to:

- 1) exclude all evidence of time-barred claims is **DENIED**;
- 2) exclude evidence of an internal complaint filed by John H. Cousins, III is **DENIED**;
- 3) exclude evidence on back pay and front pay losses is **DENIED**;
- 4) exclude evidence of emotional damages is **DENIED**;
- 5) to exclude evidence related to Ralph Herbst and Derrick Coker is **GRANTED**;

- 6) to exclude evidence related to John H. Cousins, III is **DENIED**;
- 7) exclude evidence relating to the racial composition of Defendant GAI's workforce is **DENIED**;
- 8) exclude evidence on the Plaintiff's back condition and heart arrhythmia is **GRANTED**;
- 9) exclude evidence regarding Defendant Jenkins alleged extramarital affair is **GRANTED**; and
- 10) prevent the questioning of Defendant Jenkins regarding his alleged use of racial epithets is **GRANTED IN PART and DENIED IN PART**, the Plaintiff will only be allowed to question Defendant Jenkins on his use of racial epithets in the period of time **AFTER 1990**.

BY THE COURT:

HERBERT J. HUTTON, J.